NO. 46533-7

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

WILLIAM HORTON JR.,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Stephanie Arend, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in concluding that appellant did not invoke the right to counsel during the police interrogation. CP 206 (Conclusion of Law 4).

2. Continued interrogation after appellant requested an attorney violated appellant's rights under Article I, section 9, of the Washington Constitution.

3. The trial court erred in admitting the statements made during the recorded interrogation.

4. The court erred in ruling that appellant's withheld adjudication from Florida constitutes a predicate conviction for the unlawful possession of a firearm charge.

5. Improper exclusion of relevant evidence violated appellant's constitutional right to present a defense.

6. The trial court's refusal to instruct on the lesser included offenses of first and second degree manslaughter violated appellant's right to present a defense.

7. Prosecutorial misconduct in closing argument denied appellant a fair trial.

8. Trial counsel's failure to object to the prosecutor's improper argument denied appellant effective representation.

9. Cumulative error requires reversal.

Issues pertaining to assignments of error

1. Whether Article I, section 9, of the Washington Constitution requires law enforcement to clarify an equivocal request for counsel before proceeding with custodial interrogation.

2. In 1994 appellant entered a guilty plea to a charge of armed robbery in Florida, and the Florida court withheld adjudication. A withheld adjudication is not a conviction for a charge of possession of a firearm by a convicted felon in Florida. Where appellant had no other prior convictions, was the evidence insufficient to convict appellant of unlawful possession of a firearm in this case?

3. Appellant was charged with first degree murder, and he testified that he acted in self defense when the decedent attacked him believing appellant was a rival gang member encroaching on his territory. Where evidence of the decedent's gang affiliation was relevant to establish his motive for attacking appellant, place the shooting in context, and corroborate appellant's testimony, did the court's exclusion of that evidence deny appellant his right to present a defense?

4. Where the defense presented affirmative evidence from which the jury could find he was only reckless or negligent, did the court's refusal to instruct the jury on first and second degree manslaughter deny appellant his right to present a complete defense?

5. The prosecutor argued in closing and rebuttal that the jury could find appellant guilty of first degree murder if he formed the intent to kill after fatally shooting the decedent. Did this flagrant misstatement of the law on premeditation deny appellant a fair trial? If the prosecutor's misconduct could have been cured by instruction, did counsel's failure to object deny appellant the effective assistance of counsel?

6. Does cumulative error necessitate reversal?

B. STATEMENT OF THE CASE

1. Procedural History

On October 25, 2012, the Pierce County Prosecuting Attorney charged appellant William Charles Horton, Jr., with first degree murder and unlawful possession of a firearm. CP 1-2; RCW 9A.32.030(1)(a); RCW 9.41.040(1)(a). The State further alleged that Horton was armed with a firearm and that he committed the crimes with intent to "directly or indirectly cause any benefit, aggrandizement, gain, profit, or other advantage to or for a criminal street gang." CP 1-2; RCW 9.94A.535(3)(aa).

The case proceeded to jury trial before the Honorable Stephanie A. Arend. The jury returned a guilty verdict on the unlawful possession of a firearm charge but was unable to reach a verdict on the murder charge. CP 316-21. After a second trial, the jury returned a guilty verdict on the murder charge and special verdicts finding Horton was armed with a firearm and that the gang aggravator had been established. CP 407-09. The court entered findings of fact and conclusions of law for an exceptional sentence and imposed a sentence of 421 months, 60 months above the standard range, with an additional 60 months for the firearm enhancement, for a total of 481 months confinement. It imposed a concurrent standard range sentence on the firearm charge. CP 442-46, 467-70. Horton filed this timely appeal. CP 453.

2. Substantive Facts

Shortly after 3:00 a.m. on October 24, 2012, police officers were dispatched to an apartment complex in Lakewood where gunshots were heard and one man was seen dragging another man into the parking lot. 12RP[1] 204, 207. When police arrived, they saw the deceased body of Charles Pitts in the parking lot. 12RP 208, 210. As they were

[1] The Verbatim Report of Proceedings is contained in 22 volumes, designated as follows: 1RP—3/18/14; 2RP—3/19/14; 3RP—3/24/14; 4RP—3/25/14; 5RP—3/26/14; 6RP—4/8/14; 7RP—4/14/14; 8RP—5/12/14; 9RP—5/14/14; 10RP—5/27/14; 11RP—5/28/14; 12RP—5/29/14; 13RP—6/2/14; 14RP—6/3/14; 15RP—6/4/14; 16RP—6/5/14; 17RP—6/9/14; 18RP—6/10/14; 19RP—6/11/14; 20RP—6/12/14; 21RP—6/13/14; 22RP—7/11/14.

approaching the scene, William Horton ran into the parking lot from an apartment, shouting "I'm going to kill you motherfucker." 12RP 209-10. Horton was carrying a gun in one hand, and his other hand was empty. 1RP 211, 277. Police ordered Horton to drop the gun and get on the ground. He complied and was taken into custody. 12RP 212-13.

There was some commotion near the apartment from which Horton had run, and officers contacted the people there. As they did so, Horton stated that he was the only suspect and the other people were not involved. 12RP 236-37. He then looked at Pitts, started laughing, and said he was dead. 12RP 238. Horton was placed in a patrol car with a video camera. 13RP 354. As he was being led to the car, he told the officer that his leg and back were injured. 13RP 364. He also said Pitts "was part of the Hilltop Crips and that's what did it." 13RP 355. Horton smelled of alcohol as he was placed in the patrol car. 13RP 365. He was advised of his rights but not questioned at that time. He was transported to the police station about 45 minutes later. 13RP 355, 357.

Baron Johnson was in the apartment, and he was asked to step outside while police cleared the residence. 12RP 214-15. There was blood on the floor in the entryway, and bloodstains indicated something had been dragged from inside to outside. 13RP 322; 15RP 698. There was blood on the wall between the living room and kitchen and blood on

the back wall of the kitchen near the bedroom. 15RP 707. Two spent cartridge casings were found in the house. 15RP 732. Another spent casing was lodged in the barrel of the gun, indicating that the gun had misfired and failed to eject the cartridge. 12RP 262; 15RP 732. Pitts had two gunshot wounds, and two bullets were recovered from his body. 15RP 682, 775. Police conducted an extensive search both inside and outside the apartment, and no third bullet was ever located. 15RP 775-76.

There was a fairly strong smell of marijuana in the apartment, although no marijuana was found when the apartment was cleared and searched. 13RP 330. A small black bag was found on the ground near Horton, which contained marijuana and Ecstasy. 12RP 277; 15RP 713; 17RP 1267. The bag had not been in Horton's hand when he ran outside with the gun. 12RP 277.

The medical examiner found gunshot wounds to Pitts' chest and abdomen. 15RP 828. He could not tell in what order the wounds were inflicted, but he determined that the chest wound was fatal. 15RP 830, 843. Both bullets entered the left side of the body and moved back and to the right. 16RP 916. The chest wound went down at a more dramatic angle than the abdominal wound, but the gun was in approximately the same location for both. 16RP 916. If the abdominal wound was caused first and Pitts bent forward in reaction to the pain before the chest wound

was inflicted, that would explain the difference in angles, with both Pitts and the shooter standing. 16RP 920-21. If the first shot was fired while Pitts was standing and the second after he was lying down, the shooter would have had to line the gun up in the same relative position to the body as the first shot when firing the second shot. 16RP 922.

Pitts had a blood alcohol concentration of .33, which would have significantly impaired his motor skills, speech, and memory. 15RP 838; 16RP 926, 929. It would be possible for someone with a .33 BAC to not remember having had contact with someone a half hour earlier due to intoxication. 16RP 931. Even an experienced drinker would be obviously intoxicated with a BAC of .33. 16RP 937.

During the investigation and trials in this case, various accounts were given of the events leading up to the shooting by witnesses and participants in the events. There was no dispute that during the day on October 23, 2012, several people were hanging out at Baron Johnson's apartment. 13RP 384. These included Horton, who was a close friend of Johnson's, Gregory Borja and his son Anthony Ross, and Alonza Williams. 13RP 370, 384; 16RP 989, 1051. Johnson barbequed, and he and his friends drank and smoked marijuana. 13RP 384, 388.

At some point during the day, police were called to the apartment because of a dispute between Horton and his girlfriend. 13RP 387. Police

patted Horton down but did not find a weapon. 17RP 1103; 19RP 1466. The situation was resolved, and the police left. 18RP 1388. Horton was upset, and he left with Carissa Bruns, his former girlfriend who had stopped by Johnson's apartment to see Horton. 18RP 1386, 1390; 19RP 1467. They had something to eat, and then talked for a while. 19RP 1467-68.

After the police incident Johnson, Borja, Ross, and Williams went to a nearby club. 13RP 392; 16RP 1052. Horton and Bruns went to the club as well. Horton was still upset at first, but his mood improved. 18RP 1414. When Bruns left, Horton joined the others. 13RP 392.

While Johnson was in the club, he saw Pitts in the parking lot. 13RP 393. Johnson was acquainted with Pitts, because Pitts had a child who lived in a neighboring complex, and it was not unusual to see him in the area. 13RP 375. Pitts did not go inside the club. 13RP 393. Borja also saw Pitts outside the club, and Pitts indicated that security would not let him in. 16RP 1058.

There was a dispute as to whether Horton had the gun with him throughout the day. Johnson and Ross testified that they had seen Horton with a gun before they went to the club, when Horton had it tucked into his pants. 14RP 595-96; 16RP 1015-16. Horton testified, however, that he did not have a gun on him. 19RP 1469. Johnson said he did not know

whether Horton had the gun when he was at the club. He agreed that there was security at the club but said they were not checking for weapons that night. 13RP 500-01. Ross, Borja, and Horton testified that there was security at the door, and people were being patted down for weapons as they entered. 16RP 1022, 1057; 19RP 1468. Borja nonetheless claimed that, after some guys had talked smack to Borja, Horton showed him a gun and said he had Borja's back. 16RP 1058. Ross, on the other hand, testified that there was no drama at the club, and the evening was uneventful. 16RP 995. Horton did not recall any incident with Borja at the club and testified that he did not have a gun while he was there. 19RP 1469.

Johnson and his friends left the club around closing and returned to Johnson's apartment. 13RP 394-95. Different people had different memories as to who rode with whom, but it was undisputed that Horton, Borja, Ross, Williams, and Pitts ended up there. 13RP 395; 16RP 998, 1061-62; 17RP 1076. Unlike Horton, Pitts seldom visited Johnson's apartment. 13RP 375. Horton testified that Pitts was walking in front of the apartment complex, but he did not go inside while the others were there. 19RP 1472. Johnson, Borja, and Ross testified that they all went inside, including Pitts. 13RP 396; 16RP 1003 17RP 1078. They claimed

that Horton and Pitts were inebriated, and they started slap boxing. 13RP 397; 16RP 1003-04; 17RP 1080.

Johnson was not feeling well, so he went into his room to use his nebulizer. 13RP 399-400. Borja, Ross, and Williams left. There is no dispute that sometime after Johnson went into his bedroom and the others left, Horton shot Pitts in the abdomen and chest, and he then dragged Pitts into the parking lot. He ran back inside to put on his shoes and jacket, and police were there when he ran outside again shouting that he would kill Pitts. 13RP 520.

On the morning of the shooting, Johnson told Officer Moody that he didn't see the shooting, but he heard one or two shots while he was in the bathroom. 13RP 456. He gave that same information to Officers Parr and Conlon. 13RP 458-60; 17RP 1258. Johnson was angry with Horton and not trying to protect him. He said he did not see the shooting, but he knew it happened because he ran out of the bathroom and saw the aftermath, and he said Horton admitted shooting Pitts. Johnson was never equivocal about whether he had seen the shooting; he was adamant that he had not. 18RP 1358.

A week later, however, Johnson changed his story. 13RP 452. In an interview with Investigator Sean Conlon, Johnson claimed for the first time that he had actually witnessed the shooting. 14RP 621; 17RP 1260.

Conlon remarked that that was new information, and he asked Johnson whether Pitts' people had threatened him or anything. 14RP 621-22; 17RP 1259. Johnson told Conlon, "They came up in my face and told me, Oh you was a lie about what happened; um, it's gonna be problems. This and that and the other, and I'm like, Wow." 14RP 621.

Johnson testified consistent with the new version of events. He said that Pitts and Horton were both at the apartment when Borja and Ross left, and Williams was already gone. 13RP 402. He was in the bathroom when he heard Pitts tell Horton that he didn't want to play anymore because Horton was drunk. Horton responded, "This is what drunk niggers do," and Johnson heard a gunshot. 13RP 427-28. Johnson said he ran out to the living room to see what was happening. He saw Horton pointing a gun at Pitts and smoke coming out of Pitts' abdomen. Pitts then collapsed, and Horton ran over and shot him two or three more times. 13RP 428-29, 443. Johnson said he started cussing Horton out. Horton told him he didn't have to worry, and he dragged Pitts outside. 13RP 431.

Johnson testified that he had left some facts out when he was first interviewed, including the names of the people who had been at the apartment. 13RP 447-48. He didn't want to be involved, and that affected how he answered the officers' questions. 13RP 450. He explained that he probably mispronounced some words and said a lot of things different

when he told the police that he didn't see the shooting. 13RP 463. He said he tried his best to describe what he saw, but he never mentioned that he saw Horton shoot Pitts. 13RP 464, 468. He did not break the shooting into two parts when he spoke to the police that day. 14RP 535. Nor did he mention hearing anything Pitts or Horton said. 14RP 540. Instead, he said that he heard gunshots while he was in the bathroom. 14RP 539. When Officer Parr asked what he saw when he came out of the bathroom, Johnson said he saw Pitts lying on the floor and Horton standing over him talking stupid. 14RP 545. On redirect Johnson claimed that he left out details in his initial interview because he was trying to protect Horton. 14RP 631.

Johnson was the only witness who could identity Borja and Ross, but he had refused to provide their names to police or defense counsel for a year and a half after the incident. 13RP 487; 15RP 664. Then, at the start of the second trial, Johnson contacted them saying Horton was trying to pin the gun on him and asked them to testify. 16RP 1041; 17RP 1096, 1099. They agreed, and at that point Johnson gave their names to the State. 15RP 665; 17RP 1246.

Anthony Ross testified that after they returned from the club, he sat on the couch for a while and then visited with Johnson while he did his breathing treatment. 16RP 1001-02. Horton had been getting in Pitts'

face and smack talking, while Pitts held his hands up for Horton to back away. 16RP 1004-08. The situation did not escalate, and when Ross and Borja left, there was no sense of tension. 16RP 1011. Borja's testimony was similar to his son's. 17RP 1079-85. He testified, however, that Horton at some point started talking about gangs. He got a bad feeling and told Ross it was time to leave. 17RP 1086.

Joshua Elam, the neighbor who had called 911, testified at trial that he was awake and at his computer when he heard a gunshot. He walked to his window and saw a man stumbling backwards out of Johnson's apartment. Another man ran out after him. Elam then called 911. As he was on the phone, he saw the first man being dragged around the corner. 18RP 1360-62. The man who was dragging him had one hand on each wrist and was not carrying anything else. 18RP 1363. Elam later saw that man come back out of the apartment wearing a jacket. He had an object in his right hand and nothing in his left hand. 18RP 1365. Elam heard only one gunshot, although he testified it could have been two shots in rapid succession. He did not hear a gunshot, followed by a pause, followed by additional shots. If the man was shot twice, both shots were fired at the same time. 18RP 1378.

Investigator Conlon testified that he works in the gang unit and responded to the scene because the crime was possibly gang related.

17RP 1185. Conlon interviewed Horton at the police station. He testified that Horton used a number of gang terms in the interview, and he defined those for the jury. 17RP 1188-92. He also described the meanings of Horton's tattoos. 17RP 1206-12. Conlon testified that the colors associated with Gangster Disciples are black and blue or black and red. Hoover Crips are orange and blue. The Chicago Bears NFL colors are orange and blue, and Horton was wearing orange and blue that night. 17RP 1234.

Conlon explained that Horton was clearly under the influence during the interview. 17RP 1256. The jury was shown a video of Conlon's interview with Horton. In it, Horton identified himself as a GD and said Pitts was a Crip. 17RP 1218. Horton said he was from Chicago and was a mob man, but he doesn't kick it with any GDs up here. Exhibit 141 at 7. Horton told Conlon that Pitts was trying to take his life, and he was protecting himself. Id. at 9-10. Pitts was a gang member who was trying to disrespect him, and he shot Pitts when Pitts threatened him. Id. at 10-12. He said Pitts was trying to "test [his] gangsta," but he didn't shoot Pitts just to shoot him; he shot Pitts to protect himself. Id. at 12-13. Pitts was saying "cuz this, cuz that" and socked Horton in the face. Id. at 14-15.

When Conlon asked where the gun came from, Horton said it was his, and there was no need to bring anyone else into this. Id. at 16. Horton said Pitts commented that he was wearing blue and orange and asked if he was a Hoover Crip. Horton told Pitts he was GD from Chicago. Id. at 18. Then Pitts "slapped the shit outta" him and they got to tussling, and Pitts was beating him up. Id. at 19. Horton told Conlon his leg was injured from when he and Pitts were fighting, although he did not seek medical treatment for the injury. 17RP 1217; 18RP 1295. The next thing he knew, Horton shot Pitts. Exhibit 141 at 91. When Conlon asked about the gun again, Horton again begged Conlon to leave his people out of this. Id. at 20-21.

Horton said that Pitts wanted to slap box him, but "he got me fucked up and slapped the shit outta me though!" It got to the point where Pitts was trying to test his waters. Horton didn't want to fight, but Pitts figured he could get some stripes on him. Id. at 27-28. Horton again asked Conlon to keep everybody else out of it. Id. After assuring Horton he would leave his people out of it, Conlon asked more questions about the gun. Horton claimed he got it from the streets, but he did not know anything else about the gun other than it was a .45. Id. at 29-30. When Conlon asked why he slap boxed with Pitts, Horton said Pitts came in drunk and high, said cuz this and cuz that, commented on his jacket, and

they started slap boxing a little. But then it got out of control, Pitts had him in a choke hold, and Horton shot him. Id. at 33.

Horton testified at trial that when they got back to Johnson's apartment after leaving the club, Johnson went straight to his bedroom, while he stayed in the living room watching TV, drinking beers, and smoking marijuana. Williams, Borja and Ross arrived about ten to 15 minutes later. Pitts had been walking out front when he and Johnson arrived, but he did not come inside. 19RP 1471-72. According to Horton, there was never a point when Borja, Ross and Pitts were in the apartment at the same time. 19RP 1474.

Borja went to Johnson's room to talk to him. Johnson was trying to get rid of a .45 caliber pistol, and he told Borja to put the word out that it was for sale. Horton testified that that was the gun used in the shooting. 19RP 1473.

Horton planned to spend the night at Johnson's apartment, and once Borja, Ross, and Williams left, he took off his shoes and jacket, preparing to sleep. 19RP 1474-75. He left the door open to air out the apartment. 19RP 1475. As he was trying to relax, he heard someone at the door saying "What's up cuz? Where the drink at?" 19RP 1475. He looked and saw it was Pitts. Id.

Horton had seen Pitts in the neighborhood before, and the only thing he could remember about Pitts at that time was seeing him beat up somebody in the street about a week earlier. 19RP 1477. Horton explained that Pitts had been beating up another gang member. He was on top of the other guy hitting him, and Johnson had to break it up by tackling Pitts. Johnson told Horton Pitts was always doing things like that and he was probably high. 19RP 1477. Johnson had testified that he remembered the incident as well, saying it was a heated argument and he had to wrestle Pitts off the other man. 14RP 595.

When Pitts walked into the apartment, Horton was caught off guard. 19RP 1479. Pitts did not seem to be in his right mind. He was demanding alcohol, and Horton told Pitts he would not give him any. Pitts was very agitated and upset. 19RP 1479-80. Next he focused on Horton's jacket, saying it was Hoover colors. He was very upset at having those colors in his neighborhood. 19RP 1480. Horton told Pitts he wasn't Hoover. He said he was from Chicago and used to be GD, trying to assure Pitts that he was not an enemy. 19RP 1481. Pitts kept using the word cuz, which Horton interpreted as a threat meant to let him know Pitts was a Crip. 19RP 1482.

Horton was still in the recliner at that point, and Pitts kept throwing his arm at Horton like he was going to attack. He approached

with his fist balled up and kept "flinching" at Horton. 19RP 1483-84. Then Pitts hit Horton in the head, and Horton testified he had never been hit that hard in his life. 19RP 1484. He got out of the chair and grabbed Pitts to keep Pitts from hitting him, but Pitts punched down on Horton's back. When Horton tried to scoot past Pitts, Pitts grabbed him in a headlock and hit the top of his head, and Horton twisted his leg. 19RP 1484-85. Pitts kept saying he was going to kill Horton. 19RP 1485. Horton testified that there was nothing he could do while Pitts held him in a chokehold, but when Pitts loosened his grip, Horton broke free. Pitts grabbed his shirt, and it came off. Horton turned and ran toward Johnson's room and smashed into the computer desk. He saw Johnson's gun, and he grabbed it because Pitts was coming at him ready to attack again. Horton turned and fired the gun. 19RP 1486-88.

Horton did not realize he had fired twice. 19RP 1488. When he fired the gun he was thinking that he wanted Pitts to stop attacking him and he didn't want to die. He believed Pitts was going to kill him. It was not his intention to kill Pitts. He just wanted Pitts to stop attacking him. 19RP 1489.

Horton dropped the gun in the kitchen after he fired it. He was standing there in shock when Johnson came out of his room. 19RP 1488-89. Johnson was hysterical. He did not understand why Pitts was in his

home or why Horton had shot Pitts. Horton testified that Johnson did not care that Horton had been attacked. The only thing he cared about was not going to prison. He told Horton to get Pitts out of the apartment. 19RP 1490. Horton told Johnson he would not let Johnson get in trouble, so he pulled Pitts into the parking lot. Then he went back inside, picked up the gun in the kitchen, put on his shoes and jacket, and went back outside. 19RP 1491. He had no memory of standing over Pitts outside and saying he was going to kill him, and he did not believe that happened. 19RP 1581, 1586.

While Horton was moving Pitts outside, Johnson gathered up guns and drugs from his room and put them in his truck, trying to save himself. 19RP 1492. He threw Horton's bag, which contained marijuana and Ecstasy, outside next to Pitts. 19RP 1494. Horton explained that he and Johnson sold drugs out of the apartment, and Johnson's main concern was hiding evidence of that. 19RP 1492. Horton was still trying to protect Johnson when he spoke to Conlon and said the gun was his. 19RP 1518.

Horton testified that he did not shoot Pitts while he was lying on the floor as Johnson claimed. Pitts was attacking him and coming toward him when he shot Pitts. There was no pause between shots, and Johnson was not in the room when the gun was fired. 19RP 1495. Horton testified that he was tired and intoxicated and his judgment was impaired, but he

had no choice but to shoot Pitts because he was in fear for his life. Horton believed Pitts when he said he would kill him. 19RP 1496-97.

C. ARGUMENT

1. HORTON'S STATEMENTS IN HIS CUSTODIAL INTERROGATION SHOULD HAVE BEEN SUPPRESSED BECAUSE THE LAW ENFORCEMENT OFFICER FAILED TO CLARIFY WHETHER HORTON WAS INVOKING HIS RIGHT TO COUNSEL.

Horton was taken into custody at the scene and transported to the Lakewood Police Station. 1RP 40. Investigator Sean Conlon could tell that Horton was intoxicated, and Horton expressed some confusion, but Conlon nonetheless proceeded to interview Horton after advising him of his rights. 1RP 56, 58-59.

After signing the acknowledgment of rights form, Horton asked Conlon if Pitts was in the hospital. Conlon told Horton that Pitts had died, then he asked Horton how he knew Pitts. At that point Horton started talking about a lawyer:

Horton:	I don't know him. Why all … if I knew him I woulda said his name … well, I know (unintelligible) … frickin lawyer man.
Conlon:	Huh?
Horton:	I do have a lawyer?
Conlon:	You do have a lawyer?
Horton:	I don't have a lawyer…yeah, but…that cat was (unintelligible) for fuck shit, man.
Conlon:	What was that for? What'd you have a lawyer for?
Horton:	Why would I have a lawyer?
Conlon:	For a previous case?

Horton:	Huh?
Conlon:	For a previous case, is that what you're sayin?
Horton:	Ah … nah, I ain't got no lawyer for a previous case, but I do have lawyers, you know what I'm sayin? But I'm just sayin what this guy right here, man…it's fucked shit, man. Nah…
Conlon:	Before you were into that kinda stuff, what … like … are you … you're not from here, though, right?

Exhibit 141, at 5. Conlon testified at the CrR 3.5 hearing that Horton never asked for an attorney, so he continued with the interview. 1RP 58.

Trial counsel argued that when Horton said during the interview that he had lawyers, he was asserting his right to counsel, and questioning should have stopped. At the very least, Conlon should have attempted to clarify whether Horton was invoking his right. 1RP 77-78. Instead, Conlon directed Horton away from the issue by asking where he was from. Because Horton's invocation of his right to counsel was not honored, his statements during the interview should be excluded from trial. 1RP 87.

The court disagreed. It ruled that because Horton did not unequivocally invoke his right to counsel, Conlon was not required to end the interrogation, and Horton's statements were admissible. 1RP 98-101; CP 202-07.

A criminal defendant has a right not to incriminate himself, arising from the Fifth Amendment to the United States Constitution, and article I,

section 9, of the Washington Constitution. This right includes the right to an attorney during custodial interrogation. State v. Radcliffe, 164 Wn.2d 900, 905, 194 P.3d 250 (2008). This right may be voluntarily waived. But even once waived the suspect may ask for an attorney at any time. If he does, all questioning must stop until he has an attorney or starts talking again on his own. Id. (citing Edwards v. Arizona, 451 U.S. 477, 484-85, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981)).

In 1982, the Washington Supreme Court held that a suspect's equivocal request for an attorney forbids further police questioning except to clarify the request. State v. Robtoy, 98 Wn.2d 30, 39, 653 P.2d 284 (1982). Twelve years later, the United States Supreme Court held that, under the Fifth Amendment, once a suspect has already knowingly waived his right to an attorney, only an unequivocal request to speak to an attorney requires police to end the interrogation. Davis v. United States, 512 U.S. 452, 459, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994). The Washington Supreme Court has acknowledged that it is bound by Davis in applying the Fifth Amendment in Washington. Radcliffe, 164 Wn.2d at 906-07. What remains unanswered is whether the Robtoy rule applies under Article I, section 9, of the Washington Constitution. See State v. Baze, ___ Wn. App. ___ (Cause No. 44168-3-II, March 31, 2015).

a. Article I, section 9, expressly bars the police from failing to honor Horton's invocation of his right not to incriminate himself.

After Horton was advised of his rights, he asked Investigator Conlon if he had an attorney. Conlon asked if he had an attorney from a previous case, and Horton said not from a previous case, but he did have attorneys. Conlon then changed the subject, asking Horton where he was from. Even though Horton's comments about an attorney could be considered equivocal, by continuing to question Horton without clarifying whether he was invoking his right, the police violated the more protective requirements of article I, section 9, of the Washington Constitution.

An examination of the independent requirements of the state constitution under State v. Gunwall, 106 Wn.2d 54, 65, 720 P.2d 284 (1986), demonstrates that the police violated Horton's right not to incriminate himself by having counsel during an interrogation.

i. There are significant differences in the text of article I, section 9, and the Fifth Amendment.

Article I, section 9, of the Washington Constitution provides, "No person shall be compelled in any criminal case to give evidence against himself." By contrast, the Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself." By using the word "witness," the Fifth Amendment focuses on the right

not to testify against oneself at trial. See Michigan v. Tucker, 417 U.S. 433, 440, 94 S.Ct. 2357, 41 L.Ed.2d 182 (1974); Cf. Crawford v. Washington, 541 U.S. 36, 51, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) (defining "witness" as person who "bears testimony"). The framers of the Washington Constitution rejected a proposed version of article I, section 9, that would merely protect the right not "to testify against" oneself. Journal of the Washington State Constitutional Convention, 1889, at 498 (B. Rosenow ed. 1962). They favored the broader "give evidence" standard. Id.

They also changed the structure of the constitutional provision from the Fifth Amendment, placing the double jeopardy clause after the right to be free from giving evidence against oneself, further demonstrating an intent to emphasize the right to remain silent. Art. I, § 9. The provision's language expressly provides strong protection against self-incrimination at the investigatory stage of the criminal process.

In Massachusetts, the state constitution uses language similar to Washington's, providing that no person shall be compelled to "furnish evidence against himself." Mass. Const. art. 12. Its Supreme Court has construed this state constitutional provision as more protective than the Fifth Amendment in the context of determining whether a person has

invoked the right to cut of police questions. Commonwealth v. Clarke, 960 N.E.2d 306, 319-20 (Mass. 2012).

Similarly, the text of article I, section 9, and its structural difference from the Fifth Amendment demonstrate the intent to confer stronger protection against self-incrimination in Washington. See Gunwall, 106 Wn.2d at 65.

ii. Constitutional law and pre-existing state history favor stronger individual protections under article I, § 9.

The third and fourth Gunwall factors, constitutional and common law history and pre-existing state law, demonstrate that article I, section 9, provides stronger protection than the Fifth Amendment. The delegates of the Constitutional Convention rejected language similar to the Fifth Amendment and instead used broader terms providing more protection to a person's right to be free from being compelled to provide evidence against himself. See Rosenow, supra.

As Robtoy demonstrates, this state's case law provided greater protection then the United States Supreme Court has endorsed. See Robtoy, 98 Wn.2d at 39. In Robtoy, the Court held that when a request for counsel is equivocal, the only questions that may follow this request is to clarify the person's intent to invoke his rights. Id. at 39. As the Court explained,

> Whenever even an equivocal request for an attorney is made by a suspect during custodial interrogation, the scope of that interrogation is immediately narrowed to one subject and one only. Further questioning thereafter must be limited to clarifying that request until it is clarified.

Id. at 39. The Robtoy rule was more protective than the approaches some other state and federal courts used at that time. See Smith v. Illinois, 469 U.S. 91, 96 n.3, 105 S.Ct. 490, 83 L.Ed.3d 488 (1984).

Although the Supreme Court noted that Robtoy conflicted with precedent from the United States Supreme Court, it has not reached the state constitutional issue. See Radcliffe, 164 Wn.2d at 907. Robtoy was the law in Washington for decades and that it provided stronger protection than that which was ultimately afforded by the United States Supreme Court under the Fifth Amendment weighs in favor of a broader interpretation of the rights protected by article I, section 9.

iii. Structural differences and matters of particular state concern necessarily favor broader protection for individual rights.

The structural differences between the state and federal constitutions always supports an independent constitutional analysis under Gunwall because the federal constitution is a grant of power from the states, while the state constitution represents a limitation on the State's power. State v. Young, 123 Wn.2d 173, 180, 867 P.2d 593 (1994). While individual rights were made part of the federal constitution as later

amendments, our state constitution begins with the Declaration of Rights accorded to individuals.

State law enforcement measures are also a matter of state or local concern. Id. In Miranda, the court "encourage[d]" states to search for "increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal laws." Miranda, 384 U.S. at 467. The fundamental fairness of trials held in Washington is a matter of particular state concern. State v. Bartholomew, 101 Wn.2d 631, 640, 683 P.2d 1079 (1984). Fundamental fairness dictates that when a suspect invokes his rights during custodial interrogation, police must limit further questions to clarifying the request, not trying to access additional information or receiving further permission to invade the person's private affairs. See Robtoy, 98 Wn.2d at 39; see also State v. Snapp, 174 Wn.2d 177, 189-90, 275 P.3d 289 (2012) (explaining more extensive protections of private affairs under state constitution than federal counterpart).

b. The continuing interrogation violated Horton's rights under the Washington Constitution.

In sum, an evaluation of the Gunwall factors shows article I, section 9, provides broader protection against being compelled to give evidence against oneself than the Fifth Amendment. The framers of the

Washington Constitution purposefully chose language that is different from the Fifth Amendment, the structure of the state constitution emphasizes individual rights, and prior caselaw in this state protected individuals who asserted their rights ambiguously from continued questioning. This Court should hold that under article I, section 9, if a suspect asserts his right to refrain from giving further evidence against himself, further questioning may only pertain to clarifying an ambiguity, not attempting to gather evidence in another fashion.

The continued interrogation in this case violated Horton's rights under the Washington Constitution, and his statements to Conlon should have been excluded. The State relied extensively on those statements in its case in chief, and it cannot show that the error was harmless beyond a reasonable doubt. Even though Horton said in the interview that he had been acting in self defense, the State used his statements to argue that he had trouble sticking with that story, and what really happened was Pitts disrespected Horton, and Horton decided to kill him in response. The State cannot prove that the outcome of the trial would have been the same without Horton's recorded statements and the prosecutor's arguments about them. This Court should reverse Horton's convictions and remand for a new trial.

2. BECAUSE HORTON'S FLORIDA WITHHELD ADJUDICATION IS NOT A CONVICTION, THERE WAS INSUFFICIENT EVIDENCE TO CONVICT HIM OF UNLAWFUL POSSESSION OF A FIREARM.

In 1994, Horton pled guilty to a charge of armed robbery in Florida. The Florida court withheld adjudication, pursuant to Fla. Stat. Ann. § 948.01(2), and placed Horton on probation. Exhibit 10-B. Under Florida law, despite a guilty plea, a sentencing court may withhold an adjudication of guilt if it appears to the court that the defendant is not likely to engage in further criminal conduct and the ends of justice and the welfare of society do not require the defendant to suffer the penalty of conviction. The court may instead impose probation. Id.

Prior to trial in this case, defense counsel moved to dismiss the unlawful possession of a firearm charge, on the ground that the withheld adjudication does not constitute a predicate felony necessary to establish that charge. CP 160-62; 1RP 145; 2RP 36-40. The court denied the motion, ruling that a plea of guilty combined with a withheld adjudication constitutes a conviction for the purpose of RCW 9.41.040. 4RP 4.

No Washington court has addressed this issue. Division One of the Court of Appeals has previously held that a withheld adjudication from Florida must be included in a defendant's offender score. State v. Heath, 168 Wn. App. 894, 901, 279 P.3d 458 (2012). Florida cases also

recognize that a withheld adjudication is considered a prior conviction for sentencing purposes. Montgomery v. State, 897 So.2d 1282, 1286 (Fla.2005).

For the purpose of a charge of possession of a firearm by a convicted felon, however, Florida courts do not consider a withheld adjudication a conviction. That offense requires a prior adjudication of guilt. Thus, where the adjudication has been withheld, the offender is not a convicted felon. Castillo v. State, 590 So.2d 458, 460-61 (Fla. Dist. Ct. App. 1991); see also State v. McFadden, 772 So.2d 1209, 1215 n.5 (Fla.2000) (Florida Supreme Court recognized that for purpose of felon in possession of firearm statute, defendant must actually be adjudicated guilty to be a convicted felon); State v. Gloster, 703 So.2d 1174, 1175-76 (Fla. Dist. Ct. App. 1997) (defendant who has had adjudication withheld and successfully completes probation is not a convicted person) approved sub nom. Raulerson v. State, 763 So.2d 285 (Fla. 2000).

Horton's conviction for unlawful possession of a firearm in this case can be upheld only if he has a prior conviction for a serious offense. See RCW 9.41.040(1). This Court should hold, consistent with Florida's interpretation of its statute permitting a withheld adjudication, that the Florida armed robbery charge did not result in a conviction. Horton's conviction should be reversed.

3. EXCLUSION OF EVIDENCE OF PITTS' GANG AFFILIATION VIOLATED HORTON'S CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE.

Both the state and federal constitutions guarantee a criminal defendant the right to present evidence in his own defense. U.S. Const. Amend. VI, XIV; Const. art. I, § 22. This right to present a defense guarantees the defendant the opportunity to put his version of the facts as well as the State's before the jury, so that the jury may determine the truth. State v. Maupin, 128 Wn.2d 918, 924, 913 P.2d 808 (1996) (citing Washington v. Texas, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967)).

Relevant, admissible evidence offered by the defense may be excluded only if the prosecution demonstrates a compelling state interest in doing so. State v. Hudlow, 99 Wn.2d 1, 15-16, 659 P.2d 514 (1983). Although a trial court has discretion to determine whether evidence is admissible, a decision which is manifestly unreasonable or based on untenable grounds must be reversed on appeal. See State v. Crowder, 103 Wn. App. 20, 25-26, 11 P.3d 828 (2000), review denied, 142 Wn.2d 1024, (2001).

Evidence is relevant if it has any tendency to make the existence of a fact of consequence to the action more or less probable than it would be without the evidence. ER 401. Only minimal logical relevancy is

required for evidence to be admissible. State v. Bebb, 44 Wn. App. 803, 815, 723 P.2d 512 (1986) (quoting 5 K. Tegland, Wash. Prac. § 83, at 170 (2d ed. 1982)), affirmed, State v. Bebb, 108 Wn.2d 515, 740 P.2d 829 (1987).

Throughout the proceedings below, the court granted the State's motions to exclude evidence that Pitts was affiliated with a gang. The State's main contention was that because the gang aggravator required proof that Horton's actions were gang-motivated, only Horton's beliefs were relevant. Whether those beliefs, especially as to Pitts' gang affiliation, were accurate was irrelevant and prejudicial to the State.

For example, Johnson testified on cross examination that he was not aware of Horton being involved in any gang activity. He knew Horton had tattoos and had previously been associated with the Gangster Disciples out of Chicago, but he did not know if Horton was still involved with that gang. 13RP 471. When defense counsel asked Johnson if he knew whether Pitts was associated with a street gang, Johnson said yes. The court sustained the prosecutor's objection and granted the motion to strike Johnson's answer. 13RP 472. Outside the jury's presence, the court explained that it sustained the objection because whether Pitts was a member of a gang was not relevant. The only issue was what Horton believed about Pitts' gang status. 13RP 477-80.

The court also permitted the State, over defense objection, to redact a diagram created by the medical examiner so that the jury would not learn that Pitts had a gang tattoo on his chest. 15RP 807-20. This was despite the fact that Johnson had testified that Pitts had his shirt off during the evening, the living room was well lit, and his tattoos would have been visible to Horton. 14RP 529-30. Counsel argued that Horton would testify he believed Pitts was a member of the Hilltop Crips because he did not see the Lakewood Hustlers tattoo. It was significant that he did not see the tattoo, because it was disputed whether they were both in the same room slap boxing with their shirts off. 15RP 818. The court maintained that there was no relevance to whether Pitts was a gang member, and if so, what gang. 15RP 820.

After interviewing Borja and Ross, defense counsel again asked to be permitted to elicit evidence about Pitts' gang membership. He argued that the jury would hear Horton's interview with Conlon during which he said Pitts was coming at him saying he was a gang member. Counsel explained that he was not seeking to present this evidence just to show Pitts was a bad person. The fact that Pitts was a gang member corroborated Horton's description of the conversation they had. It was therefore relevant to the defense. 16RP 949-50. Excluding evidence of Pitts' gang affiliation would prevent the defense from arguing its theory of

the case. 16RP 951. The court again ruled that it was not relevant that Pitts was in a gang, just that Horton thought he was. 16RP 952.

Defense counsel reiterated that he was not trying to suggest that Pitts was violent because he was a Crip or that his behavior was bad because he was a Crip. Rather, because the statements Horton would testify Pitts made were consistent with him being a Crip, evidence that Pitts was in fact a Crip would corroborate Horton's testimony. 16RP 972. Counsel also pointed out that gang evidence is admissible under the motive exception to ER 404(b), and in this case Pitts' attack on Horton was gang motivated, because of the colors of Horton's jacket. Therefore his gang affiliation was relevant. 16RP 980. The court ruled that defense could inquire whether any of the State's witnesses saw any gang animosity, but whether anyone but Horton was a gang member was not relevant. 16RP 982.

Borja then testified that based on the nature of conversations he heard, this was not a gang-related incident, and the actions were not in retaliation for being in any gang. 17RP 1114. Borja was aware of everyone's gang status, as were the other people at the apartment. 17RP 1114. Borja testified that he had been an Eastside gang member and that Horton was BGD. 17RP 1114. The court would not permit him to testify to Pitts' gang affiliation, however. 17RP 1115. Defense counsel argued

again that the evidence was relevant to Pitts' motive for attacking Horton and therefore admissible under ER 404(b), but the court sustained the State's objection. 17RP 1120, 1124.

Although Borja made a brief reference to Pitts' gang affiliation, 17RP 1126, the defense was not permitted to question Conlon, the State's gang expert, about Pitts. At a pretrial hearing, Conlon testified that Pitts was part of the Lakewood Hustlers, a Crip set under the Folk Nation. 2RP 10. Conlon explained that Crips break into sets by neighborhoods. Id. Pitts had a tattoo that connected him to the Lakewood Hustlers set. 2RP 13. The jury was not permitted to hear that evidence.

The court abused its discretion in this case by excluding evidence of Pitts' gang affiliation. Such evidence was relevant because it established Pitts' motive for attacking Horton and corroborated Horton's version of events, and the court's ruling to the contrary was manifestly unreasonable.

Evidence of other crimes, wrongs, or acts is not admissible to prove a person's character in order to show conformity with those prior acts. ER 404(b). Although gang evidence generally falls within the scope of this rule, it may be admissible for other purposes, such as proof of motive, intent, or identity. Id; State v. Yarbrough, 151 Wn. App. 66, 81, 210 P.3d 1029 (2009). When evidence of other acts is offered as an

exception to ER 404(b), the court must (1) find by a preponderance of the evidence that the other acts occurred, (2) identify the purpose for which the evidence is offered, (3) determine whether the evidence is relevant, and (4) weigh the probative value against the prejudicial effect. Yarbrough, 151 Wn. App. at 81-82 (citing State v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002)).

Evidence of Pitts' gang affiliation was admissible under this framework. First, Pitts' gang affiliation was established by a preponderance of the evidence. The State's gang expert testified in a pretrial hearing that he knew Pitts to be a Lakewood Hustler Crip, and Pitts had a tattoo on his chest indicating his membership.

Next, the evidence was offered to prove Pitts' motive for attacking Horton. The defense theory was that Pitts attacked Horton because he perceived Horton to be a member of a rival gang who did not belong in his neighborhood. He referred to himself as a Crip and made comments intended to be disrespectful to Horton, which Horton interpreted as a threat based on Pitts' gang affiliation.

Gang evidence has been held admissible to prove a defendant's motive for killing someone, where the evidence showed the context in which the murder was committed. State v. Boot, 89 Wn. App. 780, 789, 950 P.2d 964, review denied, 135 Wn.2d 1015 (1998). It has also been

held admissible to support the State's theory that the defendant, a gang member, responded with violence to challenges to his status and invasion of his territory. State v. Campbell, 78 Wn. App. 813, 822, 901 P.2d 1050, review denied, 128 Wn.2d 1004 (1995). And in Yarbrough, gang evidence was admissible to establish that the defendant was motivated by his perception that the victim was associated with a rival gang. Yarbrough, 151 Wn. App. at 84.

Here, evidence of Pitts' gang affiliation would establish the context in which he attacked Horton, it would support the defense theory that Pitts responded with violence to his perception that Horton was encroaching on his territory, and it would establish that Pitts was motivated to attack Horton based on his perception that Horton was associated with a rival gang. This was a proper purpose for admission of evidence of Pitts' gang affiliation.

The offered gang evidence was also highly probative of the defense theory of the case. Horton testified that he was defending himself against Pitts, who attacked Horton believing he was a rival gang member in Pitts' territory. Evidence that Pitts was a member of the Lakewood Hustlers would corroborate Horton's testimony that events unfolded as he said. It would allow the jury to understand the context in which the

shooting occurred, so it could determine whether Horton acted in self defense.

Finally, the evidence was not more prejudicial to the State than probative of the defense. To exclude this relevant evidence, the State had to demonstrate a compelling State interest. See Hudlow, 99 Wn.2d at 15-16. No such interest was identified. The court wrongly determined that the evidence was not relevant, and the State argued that focusing on Pitts' character would be prejudicial. Any concern that the evidence offered by the defense would harm Pitts' reputation is not a compelling reason to exclude evidence relevant to the defense to a charge of first degree murder.

The right to present evidence in one's own defense is a fundamental element of due process of law. Maupin, 128 Wn.2d at 924. The criminal defendant has "the right to put before a jury evidence that might influence the determination of guilt." Pennsylvania v. Ritchie, 480 U.S. 39, 56, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987); Chambers v. Mississippi, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973) ("the right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations"). Because evidence of Pitts' gang affiliation was relevant to Horton's defense, the court's exclusion of that evidence denied Horton the

opportunity to fully defend himself against the State's charge. The court's ruling denied Horton a fundamental element of due process, and his conviction of first degree murder should be reversed and the case remanded for a new trial.

4. THE COURT'S REFUSAL TO INSTRUCT THE JURY ON FIRST AND SECOND DEGREE MANSLAUGHTER DENIED HORTON HIS RIGHT TO PRESENT A COMPLETE DEFENSE.

Horton requested jury instructions on the lesser included offenses of first and second degree manslaughter. 19RP 1637. A criminal defendant is entitled to instructions on a lesser included offense when each element of the lesser offense is a necessary element of the offense charged (the legal prong), and the evidence supports an inference that the lesser offense was committed (the factual prong). State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). There is no question that the legal prong is satisfied in this case. Manslaughter is a lesser included offense of first degree murder. State v. Schaffer, 135 Wn.2d 355, 357-58, 957 P.2d 214 (1998); State v. Jones, 95 Wn.2d 616, 621, 628 P.2d 472 (1981).

The factual prong is established when the evidence in the case supports an inference that only the lesser included offense was committed to the exclusion of the greater offense. State v. Fernandez-Medina, 141 Wn.2d 448, 455, 6 P.3d 1150 (2000). Specifically, a lesser included

offense instruction should be given "if the evidence would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater." Id. at 456 (quoting State v. Warden, 133 Wn.2d 559, 563, 947 P.2d 708 (1997) (citing Beck v. Alabama, 447 U.S. 625, 635, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980))). When determining whether the evidence at trial warranted a lesser included offense instruction, the appellate court must view the evidence in the light most favorable to the party requesting the instruction. Id. at 455-56.

Relying on State v. Perez-Cervantes, 141 Wn.2d 468, 6 P.3d 1160 (2000), the trial court stated that Horton could not overcome the presumption that he intended the natural consequences of his actions. It found that shooting at a person from a short distance could not be reckless as opposed to intentional and refused to give the manslaughter instructions. 19RP 1640-41, 1646-47.

In Perez-Cervantes, the defendant was convicted of second degree murder after he severely beat the victim and stabbed him two times with a pocket knife. Perez-Cervantes, 141 Wn.2d at 471. The trial court refused to instruct the jury on first and second degree manslaughter, and the Supreme Court agreed that the factual prong of the Workman test was not satisfied. It noted that there must be evidence which affirmatively suggests manslaughter was committed to the exclusion of murder, and it is

not enough that the jury simply disbelieve the State's evidence. Id. at 481. The defense argued that the jury could have inferred he acted recklessly, rather than with intent to kill, because he used a small knife. The Court held that there was no evidence that affirmatively established he acted recklessly or with criminal negligence. His request for manslaughter instructions rested on his theory that the jury might disbelieve evidence indicating intent to kill, which was manifested by his stabbing the victim. This was not enough to satisfy the factual prong of Workman, and the trial court properly refused to give the manslaughter instructions. Id. at 481-82.

This case is distinguishable from Perez-Cervatnes. In that case, there was no evidence affirmatively establishing the defendant committed manslaughter rather than murder, and the defense theory on the lesser offenses relied on the jury disbelieving the State's evidence on intent. Here, by contrast, the defense presented evidence which, when viewed in the light most favorable to the defense, affirmatively establishes Horton acted recklessly or negligently, rather than with intent to kill.

There was evidence that Horton was intoxicated during his encounter with Pitts. He testified that he had been drinking alcohol, using Ecstasy, and smoking marijuana on a two day bender. The officers who arrested him noticed his intoxication, and Conlon testified that he was still

under the influence during the interview a couple of hours after the shooting. Horton testified that when he fired the gun he was thinking that he wanted Pitts to stop attacking him and he didn't want to die. He believed Pitts was going to kill him. It was not his intention to kill Pitts, however. He just wanted Pitts to stop attacking him. 19RP 1489.

Moreover, Horton testified that he did not realize he had fired twice. 19RP 1488. It turns out he fired two shots, but he did not know that until he saw the medical examiner's report. 19RP 1569. The medical examiner testified that the shot to the chest was fatal. 15RP 843. The shot to the abdomen would have caused pain but would not necessarily have killed Pitts. 15RP 832, 837. He also testified that the evidence was consistent with the first shot entering the abdomen, Pitts bending over in pain, and the second shot fired in rapid succession entering the chest. 16RP 921. From this evidence the jury could find Horton accidentally inflicted the fatal wound as a result of recklessness or negligence with the gun.

An accused is assured the right to fairly defend against the State's accusations. Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973). The right to present a complete defense is protected by the Sixth and Fourteenth Amendments to the United States Constitution. Crane v. Kentucky, 476 U.S. 683, 690, 106 S. Ct. 2142, 90

L. Ed. 2d 636 (1986). These constitutional protections include the right to present one's own version of the facts and to argue one's theory of the case. Washington v. Texas, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967). The state constitution protects these rights as well. Wash. Const. art. I, § 22; State v. Maupin, 128 Wn.2d 918, 924, 913 P.2d 808 (1996).

The rule entitling the defendant to have the jury instructed on lesser included offenses protects the constitutional right to present a defense. State v. Berlin, 133 Wn.2d 541, 548, 947 P.2d 700 (1997). The court's erroneous refusal to give the instructions on first and second degree manslaughter prevented Horton from presenting his theory of the case to the jury, and reversal is required. See Warden, 133 Wn.2d at 564 (refusal to give instruction on lesser included offense when supported by evidence prevented defense from presenting theory of case and constituted reversible error).

5. THE PROSECUTOR'S MISSTATEMENT OF THE LAW ON PREMEDITATION DENIED HORTON A FAIR TRIAL.

By statute, a person is guilty of murder in the first degree when "[w]ith a premeditated intent to cause the death of another person, he or she causes the death of such person or of a third person[.] RCW 9A.32.030(1)(a). For a conviction under this statute, the act which causes

the death of another person must be done with a premeditated intent to kill. Premeditated means thought over beforehand. State v. Gentry, 125 Wn.2d 570, 598, 888 P.2d 1105, cert. denied, 516 U.S. 843 (1995); CP 418. Thus, an intent to kill formed *after* the fatal act is complete is not "premeditated intent" on which a conviction of first degree murder can be based.

Premeditation may be proved by circumstantial evidence where the inferences drawn by the jury are reasonable, and a defendant's actions after the fatal act may provide circumstantial evidence of premeditation. Gentry, 125 Wn.2d at 598; State v. Rehak, 67 Wn. App. 157, 164, 834 P.2d 651 (1992) (jury could find premeditation from circumstantial evidence that defendant prepared the gun, crept up behind victim, and shot three separate times, twice after victim had fallen to floor). Evidence that a defendant formed the intent to kill after the fatal act was committed is not evidence of premeditation, however, and it does not support a conviction of first degree murder.

This seems axiomatic. Yet the prosecutor argued to the jury in this case that if it found Horton formed the intent to kill after shooting Pitts, and he deliberated on that intent for more than a moment in time after he shot Pitts, that was premeditation and Horton was guilty of first degree

murder. This flagrant misstatement of the law constitutes prosecutorial misconduct.

a. The prosecutor's flagrantly misleading argument requires reversal.

During closing argument, the prosecutor tried to convince the jury there was evidence of premeditation, saying Horton deliberated while he was wrestling with Pitts and decided to kill him. He then took his argument further, asking the jury,

> What about everything that happens after the gunshot? Here's another great misnomer in this case. You're led to believe that premeditation could only have been formed before the shots were fired; that in the moments that he pulled the trigger, that in and of itself determines first degree and second degree murder and self defense. That is incorrect.

20RP 1696.

He told the jury to look at the elements of the "to convict" instruction. It required the State to prove Horton acted with the intent to cause the death of Pitts. He asked,

> Did he do anything after he shot Mr. Pitts? Did he act in any way? Did his actions during that time reflect an intent to cause the death of Mr. Pitts, and was that intent to cause the death premeditated? Did he do things after he shot Mr. Pitts intending to kill that man, and was it premeditated and if he did things after he shot Mr. Pitts, after there was no longer a need for self defense even if you believed his story, he's still guilty of first degree murder and second degree murder.

20RP 1697. The prosecutor continued, saying that when Horton was standing over Pitts after dragging him outside, he was trying to pull the trigger and it wasn't going off. So even after he shot Pitts and Pitts was no longer a threat, his actions were done with the intent to kill Pitts.

> [A]nd during that entire time from the time that he shot Mr. Pitts to the time that he's caught by the police, during that entire time, he's premeditated, he's deliberating, he's decided this man needs to die.
>
> So, again, don't be fooled by any notion that the analysis of whether this defendant is guilty stops at the moment he pulls the trigger. It continues from the moment he pulls the trigger until the moment that he's apprehended by the police. And because of those actions, he's likewise guilty of first degree murder.

20RP 1698-97.

Defense counsel did not object to the prosecutor's premeditation argument. Instead, he attempted to address it in his closing argument. He said that the prosecutor's argument about forming intent after the fact was not supported by the instructions. It is possible you could shoot someone and then do something which causes death, but that is not the case here. The shot to the heart was fatal. "So to suggest that somehow because he was angry at the man whose life he had to take and was threatening him is to suggest that he formed intent after the fact, is inconsistent with the law and inconsistent with the evidence that you all heard." 20RP 1739. The prosecutor objected that defense counsel was misstating the law, and the court sustained the objection. Id. Counsel then stated that he guessed the

prosecutor would show the jury during rebuttal argument where the jury instructions say that intent can be formed after the fact. 20RP 1740.

In rebuttal, the prosecutor argued that premeditation could be established by circumstantial evidence. Horton's actions could demonstrate his intent. Horton dragged Pitts into the parking lot, went back inside and got dressed, retrieved the gun and stood over Pitts saying he was going to kill him. 20RP 1832. The prosecutor argued that when wrestling with the idea of premeditation, the jury could draw inferences from the circumstances. Pitts was in the parking lot, injured and bleeding, and Horton thought he was still alive. The prosecutor argued that the jury could infer Horton's intent as he was standing over the body was to kill Pitts, because that's what he said he was going to do. And "[w]hen he got dressed and came back to the body, that shows that he had more than a moment in time. He was still thinking about it." 20RP 1833. Defense counsel did not object to this argument.

The prosecutor, as an officer of the court, has a duty to see that the accused receives a fair trial. State v. Carlton, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978). While a prosecutor "may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." Berger v. United States, 295

U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935). Prosecutorial misconduct may deprive the defendant of a fair trial, and only a fair trial is a constitutional trial. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984); U.S. Const. amend. V and XIV; Wash. Const. art. 1, § 3.

A defendant is deprived of a fair trial when there is a substantial likelihood that the prosecutor's misconduct affected the verdict. State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988) (citing Reed, 102 Wn.2d at 147-48). When the defendant establishes misconduct and resulting prejudice, reversal is required. State v. Copeland, 130 Wn.2d 244, 284, 922 P.2d 1304 (1996); State v. Suarez-Bravo, 72 Wn. App. 359, 366, 864 P.2d 426 (1994).

A prosecutor's argument to the jury must be confined to the law stated in the trial court's instructions. State v. Estill, 80 Wn.2d 196, 199, 492 P.2d 1037 (1972). It is misconduct for a prosecutor, with all the weight of the office behind him, to misstate the applicable law when arguing the case to the jury. Such misstatement of the law carries the grave potential to mislead the jury. Davenport, 100 Wn.2d at 762, 764.

Arguing that Horton could be convicted of first degree murder if the jury found he deliberated and formed the intent to kill Pitts *after he committed the act which caused Pitts' death* is a gross misstatement of the law on premeditation designed to mislead the jury. The evidence might

have shown that Horton believed Pitts was still alive when he dragged Pitts into the parking lot, and it might even have shown that he formed the intent to kill Pitts during the time he went back inside, got dressed, and retrieved the gun. But there was no evidence that anything Horton did after he shot Pitts caused Pitts' death. The medical examiner testified that it was the shot to the chest, fired inside the apartment, which killed Pitts. Any intent Horton might have formed after he fired that shot does not establish that Horton acted with premeditated intent to kill when he caused Pitts' death.

Prosecutorial misconduct requires reversal if there is a substantial likelihood the misconduct affected the jury's verdict. Even where defense counsel fails to object, request a curative instruction, or move for mistrial, reversal is required if the misconduct was so flagrant and ill intentioned that a curative instruction could not have obviated the resulting prejudice. Gentry, 125 Wn.2d at 640; Belgarde, 110 Wn.2d at 507.

Premeditation and the elements of first degree murder are well defined by law, and there was no supportable basis for the State's argument. The prosecutor's deliberately misleading argument went well beyond the wide latitude afforded counsel in closing argument and likely affected the jury's verdict. The appropriate inference to draw from Horton's conduct after the shooting was sharply disputed at trial. Horton

asserted he was trying to protect Johnson by removing the body and the gun from Johnson's apartment, although admittedly exercising extremely poor judgment due to his intoxication. There was evidence that Horton ran outside with the gun shouting that he would kill Pitts. Horton had no memory of doing so and therefore could not explain his behavior. The State's argument that that's when Horton formed the premeditated intent to kill on which the jury could base a conviction would lead the jury to convict even if it believed Horton did not intend to kill Pitts when he fired the fatal shot. No instruction could have cured the prosecutor's flagrant and ill-intentioned misconduct, and Horton was denied his right to a fair trial.

b. If the prosecutor's misconduct could have been cured by instruction, counsel's failure to object constitutes ineffective assistance of counsel.

The most obvious responsibility for putting a stop to prosecutorial misconduct "lies with the State, in its obligation to demand careful and dignified conduct from its representatives in court. Equally important, defense counsel should be aware of the law and make timely objection when the prosecutor crosses the line." State v. Neidigh, 78 Wn. App. 71, 79, 95 P.2d 423 (1995). If this Court decides that proper objection or request for a curative instruction could have erased the prejudice caused

by the prosecutor's misconduct, then defense counsel was ineffective in failing to take such action.

Every criminal defendant is guaranteed the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987); U.S. Const. amend. VI; Wash. Const. art. I, § 22. A defendant is denied this right when his attorney's conduct "(1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a probability that the outcome would be different but for the attorney's conduct." State v. Benn, 120 Wn.2d 631, 663, 845 P.2d 289 (citing Strickland, 466 U.S. at 687-88), cert. denied, 510 U.S. 944 (1993).

To establish the first prong of the Strickland test, the defendant must show that "counsel's representation fell below an objective standard of reasonableness based on consideration of all the circumstances." State v. Thomas, 109 Wn.2d 222, 229-30, 743 P.2d 816 (1987). To establish the second prong, the defendant "need not show that counsel's deficient conduct more likely than not altered the outcome of the case" in order to prove that he received ineffective assistance of counsel. Thomas, 109 Wn.2d at 226. Rather, only a reasonable probability of such prejudice is required. Strickland, 466 U.S. at 693; Thomas, 109 Wn.2d at 226. A reasonable probability is one sufficient to undermine confidence in the

outcome of the case. Strickland, 466 U.S. at 694; Thomas, 109 Wn.2d at 226.

There was no legitimate reason for counsel not to object to the prosecutor's misconduct, given the prejudicial nature of the prosecutor's arguments. Counsel clearly recognized the arguments misstated the law, and he attempted to correct the error by addressing it in his closing argument. If counsel had objected, however, the court would have supplied the necessary curative instruction, correcting the misstatement of the law. It is not counsel's role to persuade the jury what the law is. See State v. Byrd, 72 Wn. App. 774, 780, 868 P.2d 158 (1994), aff'd, 125 Wn.2d 707, 887 P.2d 396 (1995).

Because counsel failed to object, the jury was left without clear guidance as to whether premeditation and first degree murder were proven. As discussed above, there is a reasonable likelihood this error affected the verdict, and reversal is required.

6. CUMULATIVE ERROR NECESSITATES REVERSAL.

Under the cumulative error doctrine, even where no single error standing alone merits reversal, an appellate court may nonetheless find that the errors combined together denied the defendant a fair trial. State v. Coe, 101 Wn.2d 772, 789, 685 P.2d 668 (1984). The doctrine mandates reversal where the cumulative effect of nonreversible errors materially

affected the outcome of the trial. State v. Johnson, 90 Wn. App. 54, 74, 950 P.2d 981 (1998).

In Johnson, the trial court improperly admitted the evidence of the defendant's prior conviction and prior self defense claim, refused to allow the defense to impeach a prosecution witness with a prior inconsistent statement, and improperly admitted evidence of a defense witness's probation violation. While the Court of Appeals held that none of these errors alone mandated reversal, the cumulative effect of these errors resulted in a fundamentally unfair trial. Johnson, 90 Wn. App. at 74.

In this case, the court improperly admitted Horton's statements to law enforcement, improperly excluded evidence relevant to the defense, and improperly refused to give jury instructions on the defense theory of the case; the prosecutor misstated the law on premeditation during closing argument; and defense counsel failed to object to the prosecutor's misleading argument. Although Horton contends that each of these errors on its own engendered sufficient prejudice to merit reversal, he also argues that the errors together created a cumulative and enduring prejudice that was likely to have materially affected the jury's verdicts. Reversal of his convictions is therefore required.

D. CONCLUSION

For the reasons discussed above, Horton's convictions must be reversed. The unlawful possession of a firearm charge must be reversed, and the case must be remanded for a new trial on the murder charge.

DATED May 11, 2015.

Respectfully submitted,

_____
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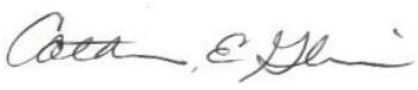
Certification of Service by Mail

Today I caused to be mailed copies of the Brief of Appellant and Designation of Exhibit in *State v. William Horton Jr.,* Cause No. 46533-7 as follows:

William Horton Jr. DOC# 375822
Washington State Penitentiary
1313 North 13th Avenue
Walla Walla, WA 99362

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Catherine E. Glinski
Done in Port Orchard, WA
May 11, 2015